MALAYAN PRODUCE COMPANY SDN BHD v. LANDBANQ SDN BHD (DALAM LIKUIDASI) & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(NCvC)(W)-798-07-2020]
10 AUGUST 2023

Abstract – *(i) A bare trustee holds nothing in his hand and is not permitted, in law, to sell or transfer properties to a subsequent purchaser; (ii) An Official Receiver and Liquidator, in administering the affairs of a company wound up by the court and in realising such company's assets, must exercise due diligence by first investigating relevant records to determine the actual ownership of the said assets.*

LAND LAW: *Ownership – Title – Developer sold properties to company – Company wound up – Appointed Official Receiver and Liquidator of company sold and transferred properties to immediate purchaser to realise company's assets – Whether properties wrongfully sold and transferred – Whether developer bare trustee to company – Rule of nemo dat quod non habet – Whether company beneficial owner of properties – Whether subsequent sale and transfer of properties void ab initio – Whether immediate purchaser afforded protection under s. 340(3) of National Land Code*

COMPANY LAW: *Winding up – Assets – Developer sold properties to company – Company wound up – Appointed Official Receiver and Liquidator ('ORL') of company sold and transferred properties to immediate purchaser to realise company's assets – Whether properties wrongfully sold and transferred – Whether ORL had power to deal with properties – Whether ORL acted with due diligence in dealing with company's assets*

The first respondent ('first defendant'), a developer, had sold certain properties to the appellant ('plaintiff'), pursuant to a sale and purchase agreement ('SPA') ('1976 SPA'). The strata titles of the properties were issued with the first defendant as the registered proprietor. The plaintiff and the first defendant were later wound up. In discovering and realising the first defendant's assets, the Official Receiver and Liquidator ('ORL') of the first defendant sold and transferred the said properties to the second respondent ('second defendant') ('2014 SPA'). This prompted the plaintiff to file a suit against the defendants at the High Court, for, *inter alia*, a declaration that the plaintiff was the beneficial owner of the properties that were wrongfully sold and transferred to the second defendant by the first defendant's appointed ORL. The High Court held that the plaintiff was not the legal and/or beneficial owner of the properties as, *inter alia*, (i) there was an absence of proof of the existence of the 1976 SPA; (ii) there were inconsistencies of

evidence in the signing dates of the 1976 SPA and vagueness in the plaintiff's 1976 SPA claim; (ii) there was a clear absence of the consideration paid for the purchase price of the properties. Additionally, there was also uncertainty as to the payment mode; and (iii) despite the plaintiff's knowledge of the issuance of the properties' strata title, the plaintiff failed to lodge its objection or caveat on the title of the said properties. Hence, the present appeal.

Held (allowing appeal; setting aside judgment of High Court)
Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) The first defendant, being the registered proprietor of the properties after executing the 1976 SPA and having received the full purchase price, was a bare trustee to the plaintiff. As such, the first defendant was not permitted to deal with the properties afterwards; in other words, the first defendant was not permitted, in law, to sell or transfer the land to the second defendant. Even the ORL, who was acting as a liquidator of the first defendant, did not have the power under the law to deal with the properties. Therefore, the subsequent sale and transfer of the properties *via* the 2014 SPA were void *ab initio*. Applying the rule of *nemo dat quod non habet* to the facts, the first defendant, who held the properties as a bare trustee to the plaintiff, had nothing in hand; it could not, and should not, pass the title of the properties to the second defendant. The second defendant, being the immediate purchaser of the properties from the first defendant, would not get any protection under s. 340(3) of the National Land Code even if any of the vitiating elements, as set out in s. 340(2), had been made out. (paras 41 & 42)

(2) As an officer of the court entrusted to deal with the company's property, the ORL held a duty to account for all actions taken in dealing with the company's assets. In implementing such duty, due diligence, transparency and accountability of all aspects of insolvency practice were paramount and indispensable. The first role of the ORL was to administer and investigate the affairs of companies wound up by the court. In relation to the dealing of the first defendant's assets, the land search done by the ORL on the title documents of the properties was inadequate. The actions taken by the ORL fell short of enough effort to ensure that the properties belonged to the first defendant. As to the due diligent effort, the ORL should investigate the first defendant's record to determine the actual status of the ownership of the properties. There surely must be some documents kept in the first defendant's records that could have clarified who the owner of the properties was. (paras 47 & 49)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

J Raju v. Kwong Yik Bank Bhd & Anor [1994] 2 CLJ 695 SC ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Letchumanan Chettiar Alagappan (As Executor to SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Peninsular Land Development Sdn Bhd v. K Ahmad [1969] 1 LNS 124 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236(2)(c), 243(1)
Companies Act 2016, ss. 2, 476, 477(1)(a), 478
National Land Code, s. 340(2)(b), (3)

For the appellant - M Thayalan & Fathima Mohd Idris; M/s Idris & Assocs
For the 1st respondent - Mariah Omar; Malaysian Department Of Insolvency
For the 2nd respondent - Ramesh Lachmanan; Nith, Gowri, Lachman & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-21NCvC-52-05-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

[1] On 3 July 2020, the Kuala Lumpur High Court dismissed Malayan Produce Company Sdn Bhd (appellant/plaintiff) claim against Landbanq Sdn Bhd (Dalam Likuidasi) (first respondent/first defendant) and Yushin Kogyo (M) Sdn Bhd (second respondent/second defendant) for the recovery of properties held under Grants No. 17518/M1/4/1, 17518/M1/5/1, 17518/M1/6/1 and 17518/M1/7/1 (the said properties). It is a decision after a full trial where a total of nine witnesses testified. The appellant/plaintiff was also ordered to pay a cost of RM50,000 to the first respondent/first defendant and RM40,000 to the second respondent/second defendant. Aggrieved by the decision, the appellant/plaintiff appealed.

[2] For ease of reference, parties will be referred to as at the High Court, that are, the plaintiff and the defendants. Individually, the defendants will be referred to as D1 and D2 respectively.

Brief Backgrounds Facts

[3] D1 was a developer of a development known as the Wisma Central, Georgetown Penang, comprising a seven-storey building with a three-storey podium. The said properties were part of the development.

[4] The plaintiff alleged that D1, sold the said properties to the plaintiff pursuant to a sale and purchase agreement dated 1 October 1976 (SPA-1976). The strata titles of the said properties were issued on 5 July 1993 with D1 as the registered proprietor.

[5] The plaintiff was wound up on 29 August 2006 until 19 August 2014. Pursuant to a Kuala Lumpur High Court Order in Winding Up Petition No: D2-28-840-2005, the plaintiff's winding up was indefinitely stayed in accordance with sub-s. 243(1) of the Companies Act 1965 (CA 1965).

[6] D1 was wound up on 31 March 2009 pursuant to a Kuala Lumpur High Court, Winding Up Petition No. D-21-100-2008 and the Malaysian Department of Insolvency was appointed as the Official Receiver and Liquidator (ORL) for D1.

[7] In discovering and realising the assets of D1, the ORL sold the said properties to D2 pursuant to a sale and purchase agreement dated 10 April 2014 (SPA-2014) for the sum of RM1.9 million. By way of a memorandum of transfer dated 23 September 2014, the said properties were duly transferred to D2.

[8] The plaintiff obtained a court order dated 19 January 2017 granting leave for the plaintiff to institute a legal proceeding against D1. Then, the plaintiff filed a suit against D1 and D2, *inter alia,* seeking the court's declaration that the plaintiff is the legal and/or beneficial owner of the said properties that were wrongfully sold and transferred to D2 by D1's appointed ORL.

Decision Of The High Court

[9] The main issue at the trial is whether or not the plaintiff is the legal and/or beneficial owner of the said properties at the material time when D1 sold and transferred them to D2 *via* SPA-2014. The learned High Court Judge (LHCJ) found that the plaintiff failed to prove its case against the defendants. The plaintiff is not the legal and/or beneficial owner of the said properties based on the following reasons:

(i) the absence of proof of the SPA-1976 existence and the inconsistency of evidence in the signing dates of the SPA-1976 and the vagueness in the plaintiff's SPA-1976 claim;

(ii) there is a clear absence of the consideration paid for the purchase price of the said properties and also uncertainty in the payment mode;

(iii) there is no evidence of the location of the SPA-1976 after the discharge of the plaintiff's purported loan facility, or of the plaintiff's attempt to secure its production in court nor, of the custodian, and the keeper of the contentious SPA-1976;

(iv) the plaintiff's caveat ceased since 9 March 1994 and D1 was found to have been issued with the said properties' strata titles since 5 July 1993, until the D1's entered into the SPA-2014 with D2, D1 had remained the legal registered proprietor of the said properties; and

(v) despite the plaintiff's knowledge of the issuance of the said properties' strata title, the plaintiff failed to lodge its objection or caveat on the title of the said properties.

As such, D1 was not acting as the plaintiff's trustee at the material time. D1 through its legally appointed ORL was empowered and authorised to execute the SPA-2014 with D2. Pursuant to para. 236(2)(c) of the CA 1965, ORL was conferred the legal authority to dispose of moveable and immoveable property of D1 by public auction, public tender or private contract and, may transfer the same in whole or in parcel to any person or company. The ORL is not legally required to obtain a vesting order for the sale and transfer of the said properties to D2. Furthermore, the ORL took immediate steps to verify and ascertain the registered ownership of D1 through official land search on the said properties' issue documents of title. So as to D2, prior to the purchase, D2 conducted a land search on the said properties' titles which disclosed that D1 was the registered proprietor with any encumbrances on the title. Thus, D2 was a *bona fide* purchaser, given that D2 had fully paid the purchase price. D2 had better equity against the plaintiff over the ownership of the said properties and has obtained good, and indefeasible titles on the said properties.

The Appeal

[10] In the memorandum of appeal, the plaintiff listed five grounds of appeal which predominantly focused on the ground that the LHCJ erred in law and in facts when Her Ladyship was plainly wrong in ignoring and failing to appreciate the undisputed contemporaneous evidence tendered by the plaintiff. There is a lack of judicial appreciation of evidence. It was argued that there is a demonstrable misunderstanding of relevant evidence and a demonstrable failure to consider relevant evidence by the LHCJ. The sum total of all the evidence tendered in court shows that the plaintiff has proven its ownership of the said properties. The LHCJ should have concluded that at all material times, the plaintiff was the owner of the said properties and the transfer of the said properties from D1 to the D2 was null and void, and therefore defeasible. As for D2, once the court finds that at the material times the said properties did not belong to D1, the impugned immediate transfer from D1 to D2 will also be null and void. The payment of the consideration sum and stamp duty paid by D2 and all the other matters stated in the defence do not affect the defeasibility of the immediate transfer from D1 to D2. D1 had nothing to transfer to D2. The question of whether the D2 was a *bona fide* purchaser for value is totally irrelevant.

Our Decision

[11] The primary claim by the plaintiff against the defendants evolved around the claim of ownership of the said properties. The main prayer in the plaintiff's amended statement of claim is for a declaration that the plaintiff is the legal and/or beneficial owner of the said properties. Thus, the main issue before the High Court and before us is whether the plaintiff is the legal and/or beneficial owner of the said properties at the time of the sale and transfer from D1 to D2.

[12] According to the plaintiff's pleaded facts in the amended statement of claim, it was alleged that the plaintiff entered into the SPA-1976 with D1 to purchase the said properties and a copy of the SPA-1976 had been given to the plaintiff and D1. The plaintiff settled the purchase price of the said properties in or around 2004. Thereafter, the plaintiff agreed to utilise the said properties as security for a loan facility given by Malayan Assurance Alliance Berhad (MAA) to Trident Hill Sdn Bhd (THSB). The plaintiff was required to surrender the SPA-1976 to the solicitors for MAA, Messrs Othman Hashim & Co for documentation. Following that, MAA and THSB entered into the facility agreement dated 3 September 2004 for the loan of RM21 million and the plaintiff had entered into a third-party deed of assignment with the MAA to assign all its rights and interests of the subject properties to MAA. Then, on 14 April 2015, a further facility of RM8 million was granted by MAA to THSB and the plaintiff entered into a second assignment to assign its right and interest of the said properties to the MAA as security. The said facilities were repaid. Before the execution of the deed of receipt and reassignment of the said properties to the plaintiff, it was discovered that the titles of the said properties had been transferred into the name of D2 without the plaintiff's knowledge.

[13] The plaintiff claimed to be the legal and/or beneficial owner of the said properties at all material times from the full payment of the purchase price in 2004. Thus, D1, through its appointed ORL, had wrongfully sold and transferred the said properties to D2.

[14] To begin with, it is trite law that the plaintiff who alleged bears the initial burden to prove the allegation. The burden of proof rests on the plaintiff throughout the case. It is only after the plaintiff had discharged the burden then the evidential burden shifts to the defendants to disprove the plaintiff's claim. The Federal Court in *Letchumanan Chettiar Alagappan (As Executor to SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 at pp. 456 to 458; [2017] 4 MLJ 697 at pp. 739 to 741 held that:

> [54] Section 101(1) provides that 'Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. 'Section 101 states that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff ...' (Woodroffe and Amir Ali, *Law of Evidence* (19th Ed

Vol 3) at p. 3194). Illustration (b) to s. 101 puts it beyond doubt that the 'burden of proof' rests throughout on the plaintiff. Section 102 provides that 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. The initial onus of proving the case is always on the plaintiff (*Sarkar Law of Evidence* 16th Ed at p 1593). Illustration (a) to s. 102 puts it beyond doubt that a plaintiff has the initial onus of proof.

[55] But 'when (the plaintiff) gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence, the onus shifts from one side to the other. When after the entire evidence has been adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has, on the evidence, no difficulty arriving at a definite conclusion, then the burden of proof on the pleading recedes into the background' (Woodroffe and Amir Ali, at p 3194; see also *Abrath v. The North Eastern Railway Company* at p 452). '... the onus of proof may shift ... but the question must ultimately arise whether the person who is bound to prove the affirmative of the issue ... has discharged ... that burden' (*Jane Wakelin v. The London and South Western Railway Company* (1886) 12 App Cas 41 per Lord Halsbury LC) or proved his case sufficiently to justify a judgment in his favour' (*Stoney v. Eastbourne Rural District Council* [1927] 1 Ch 367 at p 397 per Lord Hanworth MR).

[56] Thus a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v. Smith & Associates Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA, delivering the judgment of the court, explained that at the start of the plaintiff's case the burden of proof and the onus of proof coincide:

> ... at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of proof.

A [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat*, *Actori incibit* probation ... The plaintiff is bound in the first instance, to show a *prima facie* case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *Potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the
B defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a *prima facie* case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor*' (Woodroffe
C and Amir Ali, Vol 3 at pp. 3190-3191).

[58] 'The party on whom the *onus probandi* lies ... must begin' (Woodroffe and Amir Ali, Vol 3 at p 3192). 'The strict meaning of the term *onus probandi* is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him' (Woodroffe and Amir
D Ali, Vol 3 at p 3189). 'The principle that the party who asserts the affirmative in any controversy ought to prove his assertion, and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition. The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive
E knowledge or probabilised by experience, the mind suspends its assent until proof of them is adduced or as it has been said: 'Words are but the expression of fact; and therefore, when nothing can be said to be proved'; which is found is probably what is meant by the maxim *per rerum naturam, factum negantis probatio nulla est* (Woodroffe and Amir Ali, Vol 3 at
F pp 3190-3191).

[59] The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party if no evidence at all being given, the burden being, of course, on the adverse party' (Woodroffe and Amir Ali, Vol 3 at p 3203). That test is codified in s. 102. 'The best tests for ascertaining
G on whom the burden of proof lies, are to ascertain first which party would succeed if no evidence were given on either side; and secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued (Sarkar at p 1590).

H **[15]** Thus, the initial burden to prove that the plaintiff is legally and/or beneficially owned the said properties lies on the plaintiff. If the plaintiff succeeded, then the burden shifted to the defendants to disprove it. The question is, has the plaintiff discharged the burden?

[16] The plaintiff called five witnesses in the trial proceedings. From the
I evidence adduced, the LHCJ concluded that the plaintiff failed to discharge the burden of proof that the plaintiff is the legal and/or beneficial owner of the said properties at the time of D1's sale and transfer to D2, and therefore, as a registered owner, D2 obtained a good and indefeasible title on the said

properties. *Per contra*, learned counsel for the plaintiff argued before us that the LHCJ erred in law and in facts when Her Ladyship ignored and failed to appreciate the undisputed contemporaneous evidence tendered by the plaintiff. There is a lack of judicial appreciation of evidence.

[17] At the outset, it is pertinent to note that there is a statement of agreed facts duly agreed by the parties dated 2 May 2019 and was filed by the learned counsel for the plaintiff. For easy reference, we reproduced the whole statement of agreed facts as follows:

1. Landbanq Sdn Bhd (Company No: 16411-M) ("Landbanq") was the developer of a 7-storey building with a 3-storey podium known as Wisma Central erected on Lot No 2105 Section 12, Town of Georgetown, North East District, Pulau Pinang comprised in Geran No 13476 (now known as Lot No 2129, Section 12 Town of Georgetown, North East District, Pulau Pinang comprised in Geran No 17518) ("Wisma Central").

2. At the material time strata titles had not been issued for Wisma Central.

3. The strata title for the units at Wisma Central was issued on or around 05.07.1992.

4. Landbanq was wound up by an Order of Court dated 31.03.2009 in the High Court at Kuala Lumpur in Company Winding Up Petition No: D-21-100-2008 and the Malaysia Department of Insolvency ("Liquidator") was appointed the Liquidator of Landbanq.

5. By their letter dated 14.11.2013 the Malaysia Department of Insolvency as Liquidator of Landbanq agreed to sell Level 4, 5, 6 and 7 of Wisma Central to the Second Defendant at the purchase price of RM1,900,000.00 subject to terms and condition in the letter.

6. By a sale and purchase agreement dated 10.04.2014 the First Defendant sold the 4 Levels in Wisma Central bearing the following Strata titles:

   (i) Geran 17518/M1/4/1 on Lot No 2129 Seksyen 12, No Bangunan M1, No Tingkat 4, No Petak 1,

   (ii) Geran 17518/M1/5/1 on Lot No 2129 Seksyen 12, No Bangunan M1, No Tingkat 5, No Petak 1,

   (iii) Geran 17518/M1/6/1 on Lot No 2129 Seksyen 12, No Bangunan M1, No Tingkat 6, No Petak 1,

   (iv) Geran 17518/M1/7/1 on Lot No 2129 Seksyen 12, No Bangunan M1, No Tingkat 7, No Petak 1,

   All in the Town of Georgetown, North East District, Pulau Pinang ("hereinafter referred to as "the said properties") to the Second Defendant at the purchase price of RM1,900,000.00 subject to the terms and condition in the said agreement.

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7. By the Memorandum of Transfer in Form 14A dated 23.09.2014 under presentation No: 0799SC2014039452 the First Defendant on 06.11.2014 transferred the said properties to the Second Defendant.

8. The winding up of the Plaintiff *vide* a Court Order dated 29.08.2006 in the High Court at Kuala Lumpur in Winding Up Petition No D2-28-840-2005 was indefinitely stayed pursuant to s. 243(1) of the Companies Act 1965 by an Order of Court dated 19.08.2014.

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9. By a Court Order dated 19.01.2017 in the High Court at Kuala Lumpur Company Winding Up Petition No D-21-100-2008 the Plaintiff obtained consent to institute legal proceedings against the First Defendant.

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Based on the agreed facts, it is undisputed that D1 is the developer of the said properties and the strata title for the units at Wisma Central, including the said properties were issued on or around 5 July 1992 to D1. From thereon until the impugned transfer of the said properties to D2 on 6 November 2014, D1 remained as the registered proprietor of the said properties.

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[18] Next, we look at the plaintiff's pleaded case. In the amended statement of claim dated 20 June 2017, the plaintiff pleaded that it entered into the SPA-1976 dated 1 October 1976 with D1 for the purchase of the said properties, and that the plaintiff had fully paid the purchase price to D1. Thus, the plaintiff alleged that D1 was a trustee of the said properties for the plaintiff. Then, the plaintiff pleaded that the plaintiff utilised the said properties and the SPA-1976 as security for third-party loan facilities in favour of THSB from various financial institutions. The plaintiff further pleaded that all third-party loan facilities had been fully settled, and in 2015 when the relevant deed of receipt and reassignment was to be executed, the plaintiff was informed that the said properties had been transferred by D1 to D2 without the plaintiff's knowledge.

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[19] As to the evidence, it is clear that the plaintiff was unable to produce the actual SPA-1976 or copies of them at the trial. Learned Senior Federal Counsel (SFC) on behalf of the ORL who represented D1 submitted that in order to claim for legal ownership of the said properties, the plaintiff must tender document of title to show that the plaintiff has a legal ownership at the material time of the sale and transfer from D1 to D2. Meanwhile, learned counsel for D2 contended that there was no evidence produced by the plaintiff to suggest their entire allegation. Thus, it was a mere allegation, bare assertions without any corroborative evidences, and without any substance to substantiate it.

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[20] Learned counsel for the plaintiff argued otherwise. Even though the plaintiff was unable to produce the actual SPA-1976 at the trial, there is enough evidence to show that the SPA-1976 really exist. Krishna Kumar Sharma (PW5), who is a former director of the plaintiff in his evidence has explained why the SPA-1976 was no longer available or was no longer in the plaintiff's possession. According to SP5, the plaintiff cannot produce the

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SPA-1976 now but they used to have the document based on the fact that the said properties were used as collateral over the course of years in a number of financial facilities obtained by the plaintiff and since the strata titles were not issued then, the SPA-1976 was used as a security document. SP5 further averred that whatever copies that the plaintiff had were kept by the company secretary, who has since passed on in 2012 and when asked his family members, they did not know the whereabouts of the document.

[21] It was further argued that despite the plaintiff's inability to make available and produce the SPA-1976 at the trial, there is clear evidence from undisputed contemporaneous documents to show that the SPA-1976 existed and that the plaintiff was at all material times the legal and/or beneficial owner of the said properties.

[22] There are various contemporaneous documents referred to by learned counsel for the plaintiff allegedly adduced from the evidence tendered by the plaintiff. Firstly, the documents attached to the plaintiff's caveat application dated 2 April 1993 that had been tendered and marked as an exh. "P5" that can be seen in encl. 5 at pp. 106 to 123. Attached to the caveat application P5, there is a letter dated 17 February 1992 from D1 to the plaintiff at p. 109, which confirmed that the said properties belong to the plaintiff. The exact words used by D1 in the said letter are as follows:

> We wish to confirm that according to our records, Malayan Produce Co. Sdn. Bhd. is the owner of the abovesaid properties.

The said letter with the above quoted contents has not been disputed by anyone and it was argued that this is the clearest evidence that the said properties all belonged to the plaintiff.

[23] Secondly, in the same caveat application P5, there is an assignment dated 18 May 1976 between the plaintiff and Malaysia Borneo Finance Corporation (M) Berhad (MBF). The recital at p. 114 of encl. 5 states as follows:

> (1) By two agreements in writing both dated the 1st day of April, 1976 and made between Landbanq Sdn. Berhad (hereinafter called "the Company") of the one part And the Borrower of the other part (hereinafter called "the Principal Agreements") the Company agreed to sell to the Borrower the 3rd, 4th, 5th and 6th Floor in Central Towers, Macalister Road, Penang (hereinafter referred to as "the Premises") subject to the stipulations therein contained.
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> (2) The full purchase price of the Premises has been paid by the borrower to the Company.

At the signing page of the assignment that can be seen in encl. 5 at p. 123, it shows that D1 consented to the assignment without any hesitation or reservation.

[24] Next, there is a private caveat lodged by United Malayan Banking Corporation Berhad (UMBC) on the title of the land on which the said properties were erected which was marked as an exh. "P6". UMBC had requested for additional security from the borrowers, including the plaintiff. UMBC's Form 19B, that can be seen in encl. 5 at p. 124, *inter alia,* stated that:

> … Kami telah meminta cagaran-cagaran tambahan daripada Peminjam-Peminjam pada berkerap kali di dalam perjumpaan dengan Pengarah Urusan Peminjam-Peminjam yang mana telah pun bersetuju memberikan Gadaian Kedua ke atas Tingkat Ketiga lebih kurang 3,690 kaki persegi luasnya, Tingkat Keempat 4,010 kaki persegi luasnya, Tingkat Kelima lebih kurang 4,010 kaki persegi dan Tingkat Keenam lebih kurang 4,010 kaki persegi luasnya yang berada di dalam bangunan yang dikenali sebagai Wisma Central, Penang yang didirikan ke atas tanah-tanah yang dipegang di bawah Daftar Sementara No. Pegangan 1771 & 1764 Pecahan Bandar 12, D.T.L. Pulau Pinang.

From the UMBC's caveat application in P6, it was said that the UMBC acknowledged that the plaintiff owned the said properties as the description mentioned matches the identification of the said properties. Moreover, the 'surat akuan' supporting the UMBC's caveat application had referred to the earlier loan issued by MBF and the said properties being utilised by the plaintiff as security for the MBF loan. See para. 4 of the 'surat akuan' in encl. 5 at p. 128.

[25] There is another private caveat marked as an exh. "P7" lodged by United Asian Bank Berhad (UAB) on the title of the land on which said properties were erected. The relevant cl. 3 in the 'surat akuan' that supported the UAB's caveat application, that can be seen at pp. 142 and 143 of encl. 5 stated as follows:

> By a Deed of Assignment dated the 14th day of October 1977 and made between MPC of the one part and the Bank of the other part MPC assigned absolutely to the Bank all those two Agreements of Sale both dated the 1st day of October 1976 and made between Landbanq Sendirian Berhad of the one part and MPC of the other part (hereinafter called "the Sale Agreements") whereby the said Landbanq Sendirian Berhad sold to MPC all those the said four floors of office space erected on the said land and all MPC's rights title and interest in and to the said four floors of office space and under the said Sale Agreements and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same as additional or collateral security for all monies and liabilities secured under the said Debenture dated the 14th day of January 1977.

The deed of assignment dated 14 October 1977 made between the plaintiff and UAB obviously showed that the plaintiff assigned absolutely to UOB the SPA-1976 dated 1 October 1976 made between D1 and the plaintiff.

[26] Besides that, learned counsel for the plaintiff referred to the evidence adduced by Rosmainoor bin Osman (PW2), the Assistant General Manager of Prokhas Sdn Bhd (Prokhas). According to PW2, Prokhas continued with the matters previously handled by Pengurusan Danaharta Nasional Bhd (Danaharta), including the plaintiff's loan with MBF after Danaharta ceased its operations. In his witness statement, marked as WS-PW2 and can be seen in encl. 5 at pp. 59 to 60, PW2 testified as follows:

8. Q. What happened to the loan?

   A. The Plaintiff Company settled the loan with financing from Malaysian Assurance Alliance Berhad ("MAA"), and the security properties were reassigned back to the Plaintiff Company.

9. Q. What was the security properties that were involved?

   A. According to the records they were properties under Geran 17518/M1/4/1, Geran 17518/M1/5/1, Geran 17518/M1/6/1 Geran 17518/M1/7/1 Lot No 002129 Daerah Timur Laut Bandar Georgetown, Seksyen 12, Negeri Pulau Pinang

10. Q. How were the properties reassigned back to the Plaintiff company?

    A. A Deed of Receipt and Reassignment was executed by the parties that is Danaharta and the Plaintiff Company.

11. Q. Please have a look at pages 164-167 of En 80 is the Receipt and Reassignment was executed by the parties?

    A. Yes, that is correct. (marked as Exhibit "ID-1"]

12. Q. Who were the solicitors acting for MAA?

    A. The solicitors for MAA were Messrs Othman Hashim & Co and we were liaising with them on this.

From the above excerpt, it is comprehensible that the security properties mentioned by SP2 are the said properties and since the MBF loan was settled with financing from MAA, the said properties were reassigned to the plaintiff as the rightful owner.

[27] Learned counsel for the plaintiff also argued that there are other relevant facts that can show that the plaintiff actually owned the said properties. He referred to the statement of affairs of D1 upon being wound up dated 7 September 2009, that can be seen in encl. 5 at pp. 195 to 218 marked as an exh. "D13". Stemming from the defendants' owned exh. D13, the said properties were not listed as D1's properties. Learned counsel for the plaintiff submitted that this is a clear acknowledgment by D1 that the said properties did not belong to D1.

[28] Further, even in the annual reports for the years 2007 and 2008, the said properties were not declared or stated as belonging to D1. Those annual reports can be seen in encl. 6 at pp. 8 to 33 and 34 to 62 marked as an exhs. "P16" and "P17" respectively.

[29] Another relevant fact is the Majlis Bandaraya Pulau Pinang's (MBPP) record of ownership for the assessment collection. The evidence of Mohamed Idrus bin Haji Salleh (PW3) from MBPP in his testimony given on 16 July 2019 that can be seen in encl. 4 at pp. 45 to 48 and an exh. "P4" that can be seen in encl. 5 at pp. 103 to 105 confirmed that from 1977 and to date for the purposes of assessment collection, the plaintiff's name was in MBPP's records as the owner of the said properties. During the trial, PW3 testified that the plaintiff had paid the assessment for the said properties until 1993. It was argued that those relevant evidence supported the plaintiff's ownership claim on the said properties.

[30] Finally, learned counsel for the plaintiff refers to the settlement agreement dated 18 May 2010 marked as an exh. "P11" that can be seen in encl. 5 at pp. 157 to 174, entered into by MAA, THSB and PW5 as the 'guarantor/chargor 1'. The definition at p. 160 states that the plaintiff is "chargor 2" and the said properties is defined as "property 3". D1 was not the party to the settlement agreement. Based on the settlement agreement, learned counsel for the plaintiff submitted that the said properties at all material times did not belong to D1.

[31] Upon due perusal of the contemporaneous documents tendered in the proceedings by the plaintiff through exh. P4 – the MBPP's record dated 27 November 2018, a letter dated 17 February 1992 from D1 to the plaintiff which confirmed that the said properties belong to the plaintiff and an assignment dated 18 May 1976 between the plaintiff and MBF in exh. P5, UMBC's caveat application in exh. P6, the 'surat akuan' that supported the UAB's caveat application in exh. P7, the settlement agreement dated 18 May 2010 in exh. P11, D1's annual report for the years 2007 and 2008 in exhs. P16 and P17 respectively, D1's statement of affairs in D13, and the testimonies of PW2 and PW3 in relation to the ownership of the said properties, we are of the considered view that the plaintiff has on the balance of probability discharged its onus of proof that the SPA-1976 does exist. By the fact that the plaintiff had used the SPA-1976 and said properties as collaterals in numerous financial transactions shows that the plaintiff is the owner of the said properties.

[32] Next, learned SFC for ORL also submitted that to succeed in claiming beneficial ownership of the said properties, the plaintiff must prove that it had paid the full purchase price to D1.

[33] On this issue, learned counsel for the plaintiff referred to D1's letter dated 17 February 1992 and the recital in the MBF Assignment dated 18 May 1976, which is part of exh. P5 that was referred in para. [22] above.

It was argued that those documents clearly acknowledged that the plaintiff had paid the full purchase price to D1. It was further submitted that the plaintiff surely could not have used the said properties and the SPA-1976 as collateral or security for the loans given by MBF, UMBC and UAB unless the plaintiff owned the said properties.

[34] We totally agree with learned counsel for the plaintiff's submission. D1's own confirmation *via* the letter dated 17 February 1992 is most telling. The unequivocal confirmation by D1 that the plaintiff is the owner of the said properties stands unchallenged. So as to the other evidence in the contemporaneous documents. The use of the said properties and the SPA-1976 as collateral for the loans given by MBF, UMBC and UAB, and the settlement agreement with MAA clearly shows that there is an irresistible conclusion that the plaintiff owned the said properties. Thus, the only inference that can be made is that the plaintiff purchased the said properties through SPA-1976 and had settled all of the purchase price.

[35] Based on those findings, we are of the opinion that at all material times, the plaintiff was the legal and/or beneficial owner of the said properties. The learned judge has erroneously ignored all the undisputed contemporaneous documentary evidence tendered in court to show and confirm the existence of the SPA-1976, and the plaintiff as the rightful owner of the said properties.

[36] Now, we deal with the subsequent issues arising from the plaintiff's claim as the legal and/or beneficial owner in getting back the said properties from D2, the registered owner. Learned counsel for the plaintiff submitted that D1 upon receiving the consideration under the SPA-1976, became merely a bare trustee of the said properties for the plaintiff, and the plaintiff became the legal and/or beneficial or equitable owners of the said properties. As such, the sale and the impugned transfer of the said properties pursuant to SPA-2014 were void *ab initio*. It is further argued that D1 had nothing to sell or transfer to D2 at the material times in 2014, since D1 had no title to the said properties. Alas, the principle of *nemo dat quod non habet* applies.

[37] In contrast, learned SFC for the ORL submitted that throughout the sale of the said properties, the ORL has acted in *bona fide* and took necessary actions diligently. It was further submitted that the process of the sale of the said properties has been conducted transparently with due process of law. The ORL and D1 had verified the ownership of the properties by way of land search and the strata document of title before proceeding to the sale of the said properties. Therefore, there is no merit for the court to interfere with the decision of ORL. Meanwhile, learned counsel for D2 argued that from the facts adduced during the trial, the court will not have any problem in arriving at a conclusion that D2 is a *bona fide* purchaser of the said properties with value and without notice. Thus, D2's registrable right on the said properties were indefeasible by virtue of s. 340 of the National Land Code (NLC) and superseded the plaintiff's equitable right, if any.

[38] In dealing with this issue, we would like to reiterate our findings that the plaintiff had sufficiently proven that it had legally acquired the said properties from D1 *via* SPA-1976 and thereafter, D1 stood as a bare trustee to the plaintiff. The concept of a bare trustee in Malaysian land law is trite. The Federal Court in *Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45 held that:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the Appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

Then, the Supreme Court in the case of *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20 had occasion to hold, *inter alia*, as follows:

> [1] It is an old and well settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser.

Later, the Federal Court in *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 CLJ 561 (*Borneo Housing*'s case), Edgar Joseph Jr FCJ said as follows:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

It seems that the Federal Court in *Borneo Housing*'s case put extra burden on the claimant to prove the bare trusteeship claim. Besides the full payment of the purchase price timely paid, the purchaser had to prove that the landowner has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser in order to create a bare trusteeship bond between the landowner and the purchaser.

[39] However, the Federal Court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 (*Samuel Naik*'s case) had held, *inter alia,* that:

> (3) It is settled law that after receipt of the full purchase price and the surrender of possession of the lands to the purchasers, the vendors of the land became bare trustees. It was thus clear that MPM, being the registered proprietor of the land after executing the SPAs with the earlier purchasers and having received the full purchase price, was a bare trustee

(that is, a person without beneficial interest in the property). In other words, MPM in the present case, was not permitted in law to sell or transfer the land to the new purchasers, including the appellant. Thus, the Court of Appeal was correct in its finding that the subsequent sale of the lots by MPM to the new purchasers (including the appellant) were void *ab initi*o, as MPM did not have any legal or requisite capacity to enter into such agreements. (paras 46-54)

Then, in *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 3 MLJ 23, the Federal Court referred to its decision in *Borneo Housing*'s case and *Peninsular Land Development Sdn Bhd v. K Ahmad* [1969] 1 LNS 124; [1970] 1 MLJ 149, and also the Supreme Court decision in *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 2 CLJ 695; [1994] 2 MLJ 408; [1994] 2 AMR 1220, and made the following findings:

[36] The principle of beneficial ownership differentiates between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[37] Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

[38] On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is contractual in nature and *in personam*. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right *in personam.*

[39] In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

[40] In the recent decision, a strong panel of five judges in the case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662 (*He-Con*'s case), the Federal Court had again considered the principle of bare trusteeship. Upon considering most of the previous authorities the Federal Court made the following observation:

A [54] The apex court in the *Borneo Housing* case made a passing reference to the earlier decision of the then Supreme Court in the case of *Yeong Ah Chee*'s case. We noted that it made no adverse remark about it. Rather, it recognised the reach of the *Yeong Ah Chee* case decision by stating the following:

B > And, in *Yeong Ah Chee v. Lee Chong Hai*, the Court went so far as to suggest that the concept of the bare trust in a vendor and purchaser situation applied under the Malaysian Torrens System by virtue of the Civil Law Act 1956.

C [55] We find the *Yeong Ah Chee* case is important for what was said by learned Justice Peh Swee Chin SCJ who wrote the apex court's judgment, when he said:

> It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a
D lien on the land. Please see *Lysaght v. Edwards* [1976] 2 Ch D 499 and this case was cited with approval very often in our courts *eg,* by the Federal Court in *Intercontinental Miners Sdn Bhd v. Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v. Registrar ofTitles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee *ie*,
E unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v. Tham Kong* [1980] 2 MLJ 159, PC that the Torrens System is designed to provide simplicity and
F certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.

[56] The essence to be derived in that short but concise paragraph is that equitable principles can coexist with legal and statutory principles under the Torrens System. As was alluded to earlier, the apex court in Borneo
G Housing's case did not say that *Yeong Ah Chee*'s case was wrongly decided. With respect, we agree because *Yeong Ah Chee*'s case was decided based on sound principle.

[57] Indeed, the above principle had been adopted and followed by the Federal Court in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore*
H *& Ors* [1974] 2 MLJ 45; [1974] 1 LNS 175 ('*Temenggong Securities* case') which held that:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must
I consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[58] There was no reason for the *Borneo Housing* case panel of the Supreme Court to have viewed the *Yeong Ah Chee* case in any adverse light. Indeed, the learned justices in the *Borneo Housing* case only found it justified in overruling the *Ahmad bin Salleh*'s case for fairly obvious reasons. Since the vendor who has become a bare trustee for the purchaser, he can no longer deal with the property for which the purchaser has paid in full, including utilising it as a security for a loan extended in its favour by a third party. If one were to juxtapose the evidence which had been led by the plaintiffs in this immediate appeal before us with that which was led for the plaintiff in the *Ahmad bin Salleh*'s case one would readily see why the learned justices in the *Borneo Housing* case had found that the circumstances in the *Ahmad bin Salleh*'s case had fallen far short of rendering the vendor there a bare trustee.

[59] In fact, in a relatively recent Federal Court case of *Samuel Naik*'s case it was, *inter alia*, in para. 65 that:

> There is nothing in the NLC which expressly or by necessary implication excludes or prohibits any equitable interest in alienated land, and the court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC.

[60] That *Samuel Naik*'s case also decided that once the vendor had received full payment of the purchase price from the purchaser, the vendor becomes a bare trustee. And in that legal capacity, the vendor was not permitted in law to sell or transfer the land to new purchasers. Any subsequent conveyances of the same property to new purchasers would thus be void as the vendor, by then being a bare trustee, did not have the requisite capacity to enter into such agreement. It goes without saying that creating a charge over such property would be tainted by the same incapacity. In para. 77, the apex court in *Samuel Naik* held that the failure on the part of the original purchaser to lodge a caveat timeously did not in any way negate or defeat its equitable right, title or interest in the property under scrutiny.

[61] On the facts of the case before it, the apex court in the *Samuel Naik*'s case had answered the question posed by stating that a registered title of a *bona fide* immediate purchaser for value without notice under the NLC can be defeated by a non-registered valid equitable interest of an absolute assignee under an earlier SPA in respect of the same piece of land (see para. 86).

Subsequent to the deliberation on the issues on pleadings and the evidence tendered, the Federal Court concluded that:

[74] It bears noting and is very telling that P2 was signed on 26 April 2002, nearly five years after the signing of the SPA. The complaint by the first defendant through submission made very late in the day that P1 was not concluded could not stand in light of the fact that even after five years, the first defendant had found it fit and proper to use it as a premise to enter P2 with the deceased. As such, the combined effect of the above

A factors must be that the deceased had become the beneficial owner of the property and the first defendant had become a bare trustee for him in relation to the said property, on the balance of probabilities. Even on the terms envisaged by the *Borneo Housing* case that required something more be shown, the evidence led by the plaintiffs were sufficient to fulfil such requirement to evince the fact that the first defendant had intended to
B divest its interest in the said property *via* the first PA, *ie*, P2.

[41] Back to the appeal at hand, we find that the plaintiff had on the balance of probability successfully proven that D1 sold the said properties *via* SPA-1976 and upon realising the full purchase price, D1 stood as a bare trustee to the plaintiff. Even if the extra burden as envisaged by the *Borneo*
C *Housing*'s case is to be considered, we are of the opinion that the contemporaneous evidence led by the plaintiff was sufficient to overcome the burden, particularly from the facts adduced *via* the letter dated 17 February 1992 in P5 and the various documents related to loan facilities. Thus, as a bare trustee, D1 has no capacity to enter into any dealing with regard to the
D said properties. Following the Federal Court decision in *Samuel Naik*'s case, we hold that D1 being the registered proprietor of the said properties after executing the SPA-1976 with the plaintiff and having received the full purchase price, was a bare trustee to the plaintiff and the court will not permit D1 afterwards to deal with the said properties. In other words, D1
E was therefore not permitted in law to sell or transfer the land to D2. Even ORL, who is acting as a liquidator of D1, does not have the power under the law to deal with the said properties. Thus, the subsequent sales and transfers of the said properties from D1 to D2 *via* SPA-2014 were void *ab initio*.

F **[42]** Related to the same issue, we also consider learned counsel for the plaintiff's submission on the common law principle of the rule of *nemo dat quod non habet* (*nemo dat* rule). According to the *nemo dat* rule, no one can give what they do not have. Federal Court in *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188 had considered *nemo*
G *dat* rule in its judgment as follows:

> [34] The above finding by the Court of Appeal found support in the common law rule of *Nemo Dat Quod Non Habet* (*nemo dat* rule in short). The *nemo dat* rule literally means 'no-one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Limited* [1949]
> H 1 KB 322 as per Denning LJ). This is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. The *nemo dat* rule protects the true owner of the goods (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words, the right of the true owner is retained in the event
> I of his possession is being stolen or sold to the unsuspecting purchaser. In a typical case, the application of *nemo dat* rule involves the seller who does not own the goods has no right to sell them but nevertheless sells them to an innocent buyer. Because of the apparent harshness of the *nemo*

dat rule (as it is an innocent buyer who is a *bona fide* purchaser for value without notice stands to lose out), several exceptions to *nemo dat* rule were developed at common law and also have been added by statute (Sale of Goods Act 1957). One of the exceptions to *nemo dat* rule is when the innocent purchaser pleads estoppel by asserting that the statement and conducts of the true owner have led him to believe that the unauthorised seller in fact had the right to sell the goods (s. 27(1) of the Sale of Goods Act 1957).

[35] We are of the view that the *nemo dat* rule is equally applicable in the present case which involves the transfer of title under s. 88 of the SLO (*M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd*). Applying the *nemo dat* rule to the present case, we hold that the forgers could not pass good title to the appellants (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd*). Thus, we conclude that a mere claim of being a *bona fide* purchaser for value without notice is not sufficient to avoid the application of the *nemo dat* rule which renders the appellants' title to the land liable to be set aside at the instance of the respondents who are the rightful owners.

Applying the *nemo dat* rule to the facts of the present appeal, D1 who hold the said properties as a bare trustee to the plaintiff had nothing in hand. Therefore, D1 could not and should not pass the title of the said properties to D2. Based on the *nemo dat* rule, we find merit in the plaintiff's claim against the defendants.

[43] On the related issue of law in respect of the indefeasibility of title and interest under s. 340 of the NLC, we are guided by the principle stated by the Federal Court in the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 as follows:

[43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were bona fide subsequent purchasers. But for the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to

A pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

B At the closing of the judgment, the Federal Court spelt out guidance for the trial courts:

> [46] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the
> C title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest
> D is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person
> E or body claiming through or under such a subsequent purchaser, is indefeasible.

[44] Based on those established principles of law, we find that D2, being the immediate purchaser of the said properties from D1, will not get any protection under s. 340(3) of the NLC if any of the vitiating elements as set
F out in s. 340(2) has been made out. From our previous findings, that the subsequent sales and transfer of the said properties from D1 to D2 *via* SPA-2014 were void *ab initio* and that the *nemo dat* rule applies so as D1 could not and should not pass the title of the said properties to D2, we are of the considered view that the D2's registered title on the said properties falls
G under the vitiating elements as set out in para. 340(2)(b) of the NLC. Thus, D1 cannot rely on the protection under the umbrella of the proviso of sub-s. 340(3) of the NLC.

[45] Lastly, we would also like to address the issue raised by the defendants on the 'land search'. Learned SFC for the ORL argued that the ORL and D1
H had verified the ownership of the properties by way of land search on the strata document of title before proceeding with the sale of the said properties. Thus, it was submitted that throughout the sale of the said properties, the ORL has acted in *bona fide* and took necessary actions diligently.

[46] On this issue, we would like to stress that ORL is a creature of statute.
I Under the interpretation section of s. 2 of the Companies Act 2016 (CA 2016), the words "Official Receiver" means the Director General of Insolvency, Deputy Director General of Insolvency, Directors of

Insolvency, Deputy Directors of Insolvency, Senior Assistant Directors of Insolvency, Assistant Directors of Insolvency, insolvency officers and any other officer appointed under the Bankruptcy Act 1967 [Act 360] and the word "liquidator" includes the Official Receiver when acting as the liquidator of a corporation. As to the appointment of ORL, s. 476 of the CA 2016 provides as follows:

> **Interim liquidator**
>
> 476(1) The Court may appoint the Official Receiver or an approved liquidator as an interim liquidator at any time after the presentation of a winding up petition and before the making of a winding up order.
>
> (2) The interim liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed in the rules or as the Court may specify in the order appointing him.

[47] In cases of compulsory winding up, the court would appoint a liquidator under s. 478 of the CA 2016. If the court does not appoint a person as liquidator, the ORL, by virtue of para. 477(1)(a) of the CA 2016, will become the liquidator in the case. As an officer of the court that is entrusted to deal with the company's property, the ORL hold a duty to account all action taken in dealing with the company's assets. In implementing the duty, due diligence, transparency and accountability of all aspects of insolvency practice are paramount and indispensable.

[48] As regard to the role and duty of ORL, it is beneficial to glance through what was written on the Malaysian Department of Insolvency's (MdI) web site that can be accessed at mdi.gov.my, which stated as follows:

> The Director General of Insolvency (DGI) heads the Department of Insolvency and is the designated government official in the administration of bankruptcy in Malaysia. This encompasses the administration of the estate of the bankrupt as well as the conduct of the debtor.
>
> The DGI also acts as the Official Receiver (OR) in which he administers companies wound up by the court either as a provisional liquidator or a liquidator, where private-sector insolvency practitioner is not appointed.
>
> This dual role requires utmost responsibility to uphold the laws and serve the interests of the public. As such, the appointment of the DGI shall be from among members of the Judicial and Legal Service.
>
> …
>
> In relation to winding-up, the DGI in his capacity as the OR performs the following roles:
>
> 1. Administers and investigates the affairs of companies and partnerships wound up by the court;
>
> 2. Act as trustee/liquidator where are no private sector insolvency practitioner is appointed;

A

3. Take forward reports of directors' misconduct;

4. Is responsible for protecting the assets of the insolvent company and will take immediate steps to collect or secure any assets or property of the company; and

B

5. Supervises the conduct of any private sector insolvency practitioner appointed as liquidator of a wound-up company.

[49] As clearly stated, the first role of the ORL is to administer and investigate the affairs of companies wound up by the court. In relation to the dealing of D1's assets, we are of the opinion that the land search done by the ORL on the title documents of the said properties is inadequate. It is pertinent to note that the ORL hold the duty to investigate the affairs of D1. Thus, the actions taken by the ORL fall short of enough effort to ensure that the said properties belong to D1. As to the due diligent effort, ORL who is armed with the power to investigate the affairs of D1 should investigate D1's record to determine the actual status of the ownership of the said properties. For sure, there are some documents kept in D1's records that can clarify who is the owner of the said properties. At least, there is a statement of affairs required to be filed by D1 upon the winding up or the annual reports of D1 if not the contemporaneous documents tendered by the plaintiff in the proceedings. Based on that said reason, we find that the ORL's and D1's reliance on the land search is insufficient. It seems that the ORL's dependence on the land search alone to determine the ownership of the said properties will go against the main duty of the ORL, that is to investigate D1's affairs.

C

D

E

Conclusion

F

[50] Having considered the totality of the circumstances of this appeal, we are of the considered view that the LHCJ had misdirected herself in applying the law and committed a serious error in her finding of fact that the plaintiff failed to prove its case against the defendants. We find merit in the plaintiff's appeal which warrant appellate intervention. Therefore, the appeal is allowed and the LHCJ order is set aside. We allow prayer 34 of the plaintiff's amended statement of claim except para. (e) which is amended by substituting for Tetuan Tiong & Woon with Tetuan Idris & Associate. This order is excluding para. (j). We award cost of RM30,000 here and below to be paid by each defendant to the plaintiff subject to allocatur.

G

H

I